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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE

COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
8/10/2021
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THE STATE OF TEXAS
APPELLANT

V.

KEVIN CASTANEDANIETO
APPELLEE

CAUSE NUMBERS: PD-0253-21, PD-0254-21, PD-0255-21

APPELLEE'S BRIEF

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IDENTITY OF THE COURT, PARTIES AND COUNSEL

THE COURT

Honorable Andrew Kupper, Sitting by assignment.
Criminal District Court Number Six
Dallas County, Texas

PARTIES

KEVIN CASTANEDANIETO	Appellee
THE STATE OF TEXAS	State

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STATEMENT OF THE CASE

Three aggravated robberies were joined for trial.

Prior to trial Appellee moved to suppress the confessions he gave.

The State decided not to seek the admission of the first confession, but did seek to admit the second one.

Following a hearing, the Trial Court granted Appellee's motion.

The State filed an interlocutory appeal but failed to request findings of fact and conclusions of law.

The Fifth Court of Appeals affirmed the suppression order on a legal theory alien to those presented by Appellee at the suppression hearing.

The State filed a petition for discretionary review.

The Petition was granted. The Court of Criminal Appeals reversed and remanded the case under Tex. R. App. Proc. 78.1 (d).

The remand included a specific order that the Court of Appeals address the theories of law advanced by Appellee in the trial court. Tex. R. App. Proc. 78.3.

On remand, the Court of Appeals once again affirmed the Trial Court's suppression order. However, the Court of Appeals ignored the order of the Court of Criminal Appeals and again based its opinion on a legal theory alien to those presented by Appellee at the suppression hearing.

The State filed another petition for discretionary review. The petition was granted.

STATEMENT OF FACTS

Three aggravated robbery indictments were joined for trial. (R.R. Vol. 1, p. 3)

In cause number F17-57212 Appellee was charged with aggravated robbery by an indictment which reads:

> In the name and by the authority of the State of Texas: The Grand Jury of Dallas County, State of Texas, duly organized at the July term, A.D., 2017 of the 291st Judicial District Court for said County, upon its oath do present in and to said Court at said term.
>
> That KEVIN JOSUE CASTANEDANIETO, hereinafter called Defendant, on or about the 10th day of August, 2017 in the County of Dallas, State of Texas, did then and there intentionally and knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, threaten and place KAREN MALDANANDO in fear of imminent bodily injury and death, and the defendant used and exhibited a deadly weapon, to-wit: A HANDGUN.

(C.R. p. 10)

In cause number F17-57213 Appellee was charged with aggravated robbery by an indictment which reads:

> In the name and by the authority of the State of Texas: The Grand Jury of Dallas County, State of Texas, duly organized at the July term, A.D., 2017 of the 291st Judicial District Court

> for said County, upon its oath do present in and to said Court at said term.
>
> That KEVIN JOSUE CASTANEDANIETO, hereinafter called Defendant, on or about the 10th day of August, 2017 in the County of Dallas, State of Texas, did then and there intentionally and knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, threaten and place CRYSTAL PEDRACA in fear of imminent bodily injury and death, and the defendant used and exhibited a deadly weapon, to-wit: A HANDGUN.

(C.R. p. 9)

In cause number F18-00407 Appellee was charged with aggravated robbery by an indictment which reads:

> In the name and by the authority of the State of Texas: The Grand Jury of Dallas County, State of Texas, duly organized at the July term, A.D., 2018 of the 203rd Judicial District Court for said County, upon its oath do present in and to said Court at said term.
>
> That KEVIN JOSUE CASTANEDANIETO, hereinafter called Defendant, on or about the 10th day of August, 2017 in the County of Dallas, State of Texas, did then and there intentionally and knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, threaten and place CYNTHIA MARTINEZ in fear of imminent bodily injury and death, and the defendant used and exhibited a deadly weapon, to-wit: A HANDGUN.

(C.R. p. 9)

On July 30, 2018, a hearing was held on Appellee's motion to suppress his confession. (R.R. Vol. 1, p. 1)

Appellee confessed twice. The State proffered that it would be offering only the second confession into evidence. (R.R. Vol. 1, p. 10)

Appellee stated he objected to confession number two (hereinafter confession) as follows:

> Confession number two is a couple of days after he was arrested, after the defendant was arraigned and after the defendant requested a lawyer and after the defendant was given a lawyer. The State reinitiated contact, not the defendant, and therefore, that confession is inadmissible.

(R.R.Vol. 1, p. 10)

Detective Olegario Garcia testified he learned that Appellee had been arrested from Detective Brau. (R.R. Vol. 1, p. 15)

After Detective Garcia found out Appellee had been arrested he "went to Lew Sterrett, asked Mr. Castanedaneito if he would come back to Dallas Police headquarters and do an interview with me." (R.R. Vol. 1, p. 15)

The request was made the day after Appellee was arrested. (R.R. Vol. 1, p. 16)

Appellee agreed to go with Detective Garcia. (R.R. Vol. 1, p. 16)

Detective Garcia knew that Appellant had been interviewed "about the offenses of the previous night with a different detective in detail." (R.R. Vol. 1, p. 20)

A copy of this second interview was admitted without objection as State's exhibit 1 and published. (R.R. Vol. 1, p. 21)

Detective Garcia read Appellee his 38.22 warnings. (R.R. Vol. 1, p. 23)

The Trial Court took judicial notice of the "arraignment sheets" and the documents were admitted without objection as State's exhibit 2. (R.R. Vol. 1, p. 29)

States exhibits 3 and 4 were admitted without objection. They " are the appointment of counsel, one being declined on August 11th and one being Mr. Fishburn's appointment on August 14th." (R.R. Vol.1, p. 30)

After the State rested Appellee published the first four minutes of interview one.

(R.R. Vol. 1, p. 31-35)

Both sides rested and closed. (R.R. Vol. 1, p. 35)

Appellee argued:

> Judge, first of all, the first confession, we're not talking about a language barrier. We're talking about whether or not the defendant understands his rights and the consequences of waiving them. After the rights are read in English, he indicates that he doesn't understand English well enough to go over the legal parts, and so the officer has him read the card in Spanish, which he does.
>
> When he reads the card in Spanish, the officer proceeds and asks him if he understands. The defendant clearly, when he refers to, "I don't understand, "is referring to the waiver of his rights and the consequences of waiving them. And under Moran v. Burbine , that is a lack of awareness of … you can't waive your rights if you don't have a full awareness of the nature of the right being abandoned and the consequences of doing so.
>
> So the relinquishment of rights has to be voluntary and the waiver made in full awareness of what that means. I cite Jackson... Joseph v. State, 309 S.W. 3d, page … 20 at page 29, Court of Criminal Appeals (2010). They're quoting North Carolina v. Butler, quote, " a valid waiver will not be presumed simply from the silence of the accused after warnings are given simply or from the fact a confession was eventually obtained." Here we don't have silence. We have him expressing he

doesn't understand. This is a constitutional waiver under the Fifth and Sixth Amendments. Well, the Fifth Amendment.

Then Lilly v. State, which is 05-10-00349-CR, decided the 12th of December, 2011, Judge Richter found the confession voluntary because the defendant affirmatively, quote, "nodded and muttered yeah as to whether he understood his rights." This case is factually different from that one. In this case, the defendant expressed the fact that he did not understand the rights that he was waiving.

I also cite Mendoza v. State, 05-11-01069-CR, decided on the 4th of December, 2012. There Judge Richter found the confession voluntary because the defendant was asked if he understood his rights and he said "yes" without equivocation.

State v. Foster, 05-08-01302-CR, Fifth Court of Appeals in 2009, Judge Richter there was talking about ambiguity in the Miranda waiver. It exists when a suspect's statement may reasonably be interpreted more than one way under the, quote, circumstances.

The test of the totality of the circumstances is whether this guy understood it or not. The ambiguity was a concern for Judge Richter and the rest of the court in that case. In that case, the trial court did suppress the confession because a lack of full awareness, and that suppression was affirmed.

Judge Richter wrote the opinion saying that you have to have an unequivocal expression of a waiver under the amendment. And in this case, the defendant did say he didn't understand, so that's factually different. Now, that applies to the second confession in the following way: My client didn't gain an understanding of what he was doing under the Constitution in the intervening hours between confession 1 and confession 2. So the Miranda warnings given by the second detective don't cure the problem that we had from the first.

We also move to suppress the confession because this confession was taken after my client was arraigned on all of the robberies that were discussed. He was arraigned on the third robbery, which wasn't indicted by the State until after the fact. Ms. Wright got it and did that July 11th this year, just a few days ago.

There were three robberies that will be considered by the Court and the jury over the next few days. All three took place at McDonald's, one robbery with three victims, which makes it three robberies. Victim number 3 wasn't indicted until July. But the prosecution doesn't get the benefit of that. These confessions were obtained related to the facts that were discussed.

My client, when he was arraigned, expressed that he wanted a lawyer. He checked the box, said, Yes, I do want a court appointed lawyer. At the time he was arraigned, that's a critical stage of the prosecution. That's Carver v. State, 08-12-00300-CR, El Paso 2015. That case was following Hamilton v. Alabama, 368 U.S. 52, page 82 (1961). The rationale for this is that once the right to counsel attaches under the Sixth Amendment, the defendant's afforded more protections because now he's expressing the idea that, I do not want to deal with the State any further except through counsel. Because the entire equation has now been changed. He's not … no longer under investigation. He has now been charged and brought over and arraigned. And he asks for a lawyer, and a lawyer was appointed.

The reason we go to the trouble of appointing a lawyer right away is so the Sixth Amendment rights attach. This is no longer just a Fifth Amendment problem. Now it's a Sixth Amendment problem. The arraignment creates a subtle compulsion in the minds of anyone… not compulsion. Now I'm actually charged. If you look at the arraignment sheet, it says four aggravated robberies.

Under the circumstances we have, the police cannot reinitiate contact with the defendant after he has been interviewed and after he has been arraigned and appointed a lawyer. The second interrogation took place after Mr. … Mr. Pask was appointed, after the critical state had begun. And they just can't do that. That's under … that's pursuant to Holloway v. State, which is 780 S.W. 2d 787, Court of Criminal Appeals (1989).

We're moving under Article 38.22 today and 38.23 but 38.22 right now, and we all know it's axiomatic at this point that we're more strict about our confessions than the federal government is under the federal constitution. Once the right to counsel attaches, the lawyer is appointed, the Sixth Amendment kicks in, and they had to go through his lawyer to talk to him again. They didn't do it.

The detective said on the witness stand, I went over and asked Mr. Castaneda if he would like to come back and talk about it some more. He said sure. Clearly he reinitiated the contact. The reason the Sixth Amendment… rationale of the Sixth Amendment applying here is because it… this is designed to protect the attorney/client relationship that's been established at the point in time the second interrogation is given. Or is made. That was violated when the State went and got him out of jail. They knew he'd been arraigned. They knew he had a lawyer appointed.

Now, you've got the sheet of paper that says "declined." That doesn't matter. The Sixth Amendment had already attached and rights thereunder had already attached going through Article 38.22. And we request that you suppress the second confession on those two bases. Number 1, it was made without full awareness, which is the fruit of the poisonous tree from the first interrogation; and number 2, because the Sixth Amendment was clearly violated in obtaining this second confession.

(R.R. Vol. 1, p. 35-41)

A copy of the arraignment packet indicating Appellee requested a lawyer was admitted without objection as Defense exhibit A. (R.R. Vol. 1, p. 43-44)

Appellee responded to the State's argument:

> Holloway v. State, indicates that … counsel misses the point entirely in her argument. I quote from page 795, quote, "These requirements have the purpose of preserving the attorney-client relationship, an objective, essential to Sixth Amendment concerns and of no significance to Miranda concerns." It doesn't matter that he was read his rights under the Fifth Amendment the second time at all.
>
> And then it says, "Thus, we hold that where a relationship between the accused and his attorney has been established after the Sixth Amendment has … Sixth Amendment has become applicable, the Sixth Amendment precludes the dissolution of the relationship in the absence of counsel." The State simply cannot reinitiate contact because that violates the Sixth Amendment. And more importantly, that violates the requirements of the strict construction of Article 38.22 as passed by the Texas Legislature.

(R.R. Vol. 1, p. 45-46)

The reporter's record does not reflect that the Trial Court ruled on the motion to suppress on July 30, 2018. (R.R. Vol. 1, p. 49)

On July 31, the Trial Court granted the State's motion to reconsider. (R.R. Vol. 1, p. 50)

The State made further argument:

> Yes, Your Honor. I'd like to highlight for the Court some of the things Justice Scalia pointed out with regard and having to do with the situation in our case. He said that the principal cost of applying any exclusionary rule is, of course, letting guilty, possibly dangerous criminals go free, quoting Herring vs. United States.
>
> He said Jackson "not only operates to invalidate a confession given by the free choice of suspects who have received proper advice of their Miranda rights but waived then nonetheless but also deters law enforcement officers from trying to obtain voluntary confessions. The ready ability to obtain uncoerced confessions is not an evil but unmitigated good." quoting McNeil. " Without these confessions" he says, "crimes go unsolved and criminals unpunished. These are not negligible costs."
>
> Further, Your Honor, the court states on page 7 that it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.
>
> Finally, I'd like to point out that in this case, the defendant checked a box stating he did not need a retained attorney but wanted to have an attorney appointed to him. And even if the Court decides that his Sixth Amendment right to have an attorney for all procedures from there forth was established, that is fine, but we cannot tell somebody that they do not have

the right to waive those Sixth Amendment rights. He was told many occasions, as the Court heard testimony, that he had the right to have a lawyer present to advise him prior to and during any questioning. And each and every time he given those rights, he waived those rights, especially specifically when he was given and read those rights on August 11th of 2017. He knew he had the right to have his attorney.

But Your Honor, as the Court states in quoting Adams v. United States, "It is to imprison a man in his privileges and call it the Constitution." That cannot be the precedent we set here today to force a man to talk to a lawyer before he makes a voluntary decision to waive those rights and to cooperate with the police department. Further, it will set an unprecedented burden on a police officer to know that an email was sent from a court coordinator on her private email to random member of the State Bar in the afternoon whether or not that person accepted or denied that appointment.

And who is the police officer supposed to contact in order to speak to, as soon as he possibly could, the defendant? It makes sense, Your Honor, to go to the defendant himself who knows that he has the right, knows that he has requested an attorney and ask him, Do you want to come with me, and allow him the option to come with him voluntarily, reread those rights to him and allow him to waive those Fifth and Sixth Amendment rights. Therefore, we're asking that you base your decision on the provisions laid out in Montejo v. Louisiana by Justice Scalia and deny the defendants motion to suppress.

(R.R. Vol. 1, p. 50-53)

Appellee responded:

If you deny the motion to suppress and go with the State's argument, then after we're finished with Court today, the police can go get my client out of jail, bring him back over to headquarters and ask him if he wants to talk without ever getting in touch with me. That's exactly what they're arguing.

Furthermore, the reason Montejo overruled Jackson is because it couldn't be evenly applied across the 50 states. For example, in some jurisdictions, someone is given a lawyer whether they ask for one or not. They're automatically appointed one. So they right to counsel couldn't be said to be invoked; therefore, it couldn't be said to be waived. So the difficulty in evenly applying the rule is the reason Jackson was overruled.

Holloway v. State is the law in this state. The court of Criminal Appeals has had an ample number of years to address how Montejo might apply 38.22, and if they wanted to change the law, they had time to do it. And they haven't done that. So Holloway controls the issue.

Furthermore, Holloway governs. Additionally by the… it must be presumed that the Court of Criminal Appeals had in mind the Legislative intent in enactment of 38.22, which is more strict than the federal constitution requires. We have a different set of rules beyond Miranda and arguably beyond the Sixth Amendment as discussed in Montejo vs. Louisiana. And that would be that we require more of the police and we require more before a confession can be admitted.

The rationale of Jackson applies just as much today as it did when Holloway was decided. Holloway was decided based on an express waiver. And the rationale that they gave for that was one I expressed yesterday in the citation to Michigan vs. Jackson was nothing more than authority from the Court of Criminal Appeals for the bench and bar to further rely on if they wanted to expound on what they were already reading.

> Holloway vs. State can't be overruled in this courtroom. It has to be followed. And the right to counsel and attorney/client relationship is… has to be… has to remain inviolate. To grant… to deny the motion to suppress would allow the State to go behind my back today throughout this trial anytime they feel like it and, if they can get my client to say, Yeah, sure I'll talk to you, they come in court and say, Well we got a new confession now. We didn't tell Mr. Fishburn or Mr. Lehman about it, but Kevin over here, being 18 and all being charged with first degree felonies, surely he has the wherewithal to choose whether or not he remains silent or whether or not he wants to speak. That's incorrect. That's not how it works. The invocation of the right to counsel is an express assertion by the accused at this point that he wishes to deal with the State only through Counsel. We ask that you maintain your previous ruling.

The Trial court granted the motion to suppress. (R. R. Vol. 1, p. 60)

RESPONSE TO GROUND FOR REVIEW

The ground for review reads: Contrary to this Court's prior decision in this case, the court of appeals defied the ordinary rules for examining a waiver of a defendant's rights under Miranda and article 38.22 of the Texas Code of Criminal Procedure by applying the "cat out of the bag" coercion theory to Castanedanieto's claim that his second police interrogation theory was unknowing.

SUMMARY OF ARGUMENT

This Court ordered the Fifth Court of Appeals to reconsider the case by analyzing the theories of law Appellee presented to the Trial Court. The Court of Appeals ignored the order and once again proceeded on their own path, which failed to address the two bases advanced by Appellee for suppression. Appellee argues this Court should invoke Rule 78.1 (c) and render the judgment the Court of Appeals should have rendered after analyzing whether Appellee made a knowing waiver of his right to remain silent and whether he invoked his right to counsel between confession one and two so as to preclude the State from re-initiating contact.

ARGUMENT

(A) APPELLEE'S FIFTH AMENDMENT CLAIM

Appellee has always contended that he did not understand the substance of his legal rights to a sufficient degree to waive them. He has never contended that he didn't understand English well enough to comprehended the words being spoken by the detectives. The State continues to suffer from this misapprehension which is reflected in their brief.

Appellee has always contended that the colloquy between he and the detective at the beginning of the first confession is only relevant to demonstrate his lack of understanding of his legal rights. That is why only the first few minutes of the first confession were published to the Trial Court. Appellee does not content that the second confession was tainted by Appellee's physical condition or the detective's conduct during the first confession.

The Court of Appeals, through two opinions, continues to entertain its own odd taint theory, which was never presented to or considered by the Trial Court. Thus, Appellee disagrees with the State's assertion that this Court "should clarify the applicability of the cat out of the bag doctrine in Texas[.]"

The main purpose of Miranda is to ensure than an accused is advised and understands the right to remain silent and the right to interrogation counsel. Berghuis v. Thompkins, 130 S. Ct. 2250, 2256 (2010). Interrogation is inherently coercive and therefore there must be "full comprehension of the right to remain silent and request and attorney…sufficient to dispel whatever coercion is inherent in the interrogation process." Moran v. Burbine, 475 U.S. 412, 427 (1986). The focus is on the suspect's perspective and whether the suspect received warnings that fully ensured he comprehended his right and was adequately enlightened to avoid questioning unless he affirmatively chose it. This requires at least some level of

understanding about the consequences of conduct before one acts in a way that causes rights to be lost. This is the central assumption of Miranda. The warnings are given to dispel coercion. Coercion is dispelled when the information given is comprehended by the suspect so he can choose his course of conduct. See, Burbine, 475 U.S. 412 at 427.

"[I]f the State established that a Miranda warning was given and the accused made an uncoerced statement, that showing alone, is insufficient to demonstrate a valid waiver of Miranda rights. Thompkins, 130 S. Ct. at 2261 quoting Miranda, 384 U.S. at 475. Something else is needed. That something, the majority explains, is simply the additional showing that the accused understood these rights. Id.. Thus, "[w]here the prosecution shows a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." Id., at 2262.

In the present case Appellee was interrogated twice, by two different detectives. The first time Appellee expressly stated he didn't understand the 38.22 warnings but the detective did nothing to clarify Appellee's rights. He just started the interrogation and Appellee acquiesced by answering questions. The second detective was even more perfunctory. He read the 38.22 card, asked Appellee if he understood and moved right into the substance of the interrogation. The evidence is

conclusive that Appellee did not comprehend that he had the right to remain silent and have a lawyer present. The obvious explanation for this lack of comprehension, aside from the conduct of both detectives, was that Appellee, a teenager, had recently entered Texas from El Salvador, had little to no knowledge of the American legal system, and English was his second language. Under these circumstances there was no valid waiver and thus the confession was illegally obtained.

Miranda v. Arizona, 384 U.S. 436 (1966) and Tex. Code Crim. Proc. Ann. article 38.22 both require a comprehending waiver of the Fifth Amendment right to remain silent and the right to have a lawyer present during a police interrogation. The question in the present case is whether such a waiver was made by Appellee. The decision to forego counsel's assistance and speak openly with police is a momentous one, and in making it, a defendant must possess" a full awareness of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). In Florida v. Powell, 130 S. Ct. 1195, 1205-1206 (2010) the Supreme Court held that Miranda did require a warning that " reasonably conveyed to the suspect the right to have counsel present during interrogation, but also held that Florida's warning-which did not explicitly so state – "communicated [that] same essential message." Id.. In Powell, a number of briefs were filed in support of Powell which pointed to a

growing body of imperial research on suspects's poor comprehension of various versions of Miranda warnings. The Supreme Court did not dispute the quality of these studies which indicate that "[t]he best evidence is now that a significant percentage of suspects simply cannot comprehend the warnings or the rights they convey." Charles D. Weisselberg, Mourning Miranda, 96 Cal. L. Rev. 1519, 1563-1564 (2008). In their amicus brief the Florida Association of Criminal Defense Lawyers relied heavily on studies showing the relatively poor literacy and comprehension skills of criminal suspects, as well as studies showing relatively poor levels of comprehension of Miranda rights. They noted that since Miranda "numerous studies have examined whether criminal defendants are, in fact, understanding Miranda rights" and that "the one conclusion on which all of the studies agree is that the clarity of the Miranda warnings matters." Brief for the Florida Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 6, Powell, 130 S. Ct. 1195 (No. 08-1175) citing Richard Rogers, A Little Knowledge Is a Dangerous Thing, 63 Am. Psychologist 776, 777 (2008); Richard Rogers et al. An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage, 31 Law & Hum. Behav. 177, 178-179 (2007).

In the present case Appellee said "it's because I don't understand" when discussing his legal rights with the first interrogating detective. Had the detective

done what is required by the Constitution he would have clarified Appellee's rights in an effort to ensure Appellee in fact knew what he was waiving. Moreover, Appellee didn't gain any further understanding of his rights between the two confessions. Thus, the colloquy from the first confession is relevant and probative of the fact that Appellee did not understand the substance of his legal rights when he was asked to waive them at the outset of the second confession.

(B) APPELLEE'S SIXTH AMENDMENT CLAIM

In the few hours between the two interrogations at issue, Appellee was taken before a Dallas County magistrate for arraignment. The arraignment was conducted pursuant to Tex. Code Crim. Proc. Ann. article 15.17, which describes the magistrate's duties as follows:

> The magistrate shall inform in clear language the person arrested…of the accusation against him,… his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with a peace officer,…the magistrate shall also inform the person arrested of the person's right to request then appointment of counsel of the person cannot afford counsel.

There are two threshold elements to the Sixth Amendment right to counsel in a confession context. These are: (1) deliberate governmental elicitation, See, United v. Henry, 447 U.S. 264, 290 (1980); (2) after the initiation of formal judicial

proceedings. Kirby v. Illinois, 406 U.S. 682, 689 (1972). The Sixth Amendment right to counsel attaches "at or after the initiation of…proceedings…whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Id..

The Sixth Amendment states: "In all criminal prosecutions…the accused shall…have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. When the accused invokes the Sixth Amendment he announces he will deal with the State only through counsel from the beginning of formal proceedings (arraignment) until the end when sentence is pronounced. In the present case Appellee invoked his Sixth Amendment right to counsel at arraignment when formal proceedings began. Tex. Code Crim. Proc. Ann. article 15.17. This right was never waived. It didn't go in and out of existence depending on the context, it remained in place for all interactions with the government related to the charged offenses. It would be unreasonable to construe Appellee's request for a lawyer as a request solely for court proceedings. The "whole point of the warning,… is the right to have an attorney present during an interview with peace officers." See, Pecina v. State, 361 S.W. 3rd 68, 82 (Tex. Crim. App. 2012) (Alcala, J. concurring).

In Holloway v. State, 780 S.W. 2d 787 (Tex. Crim. App. 1989) Holloway shot and killed a Longview police officer when he tried to arrest him for aggravated

robbery. Holloway was arraigned per article 15.17 later that same morning. He was appointed counsel that afternoon. Counsel visited Holloway and told him not to submit to police questioning. Nevertheless, Longview Police Investigators Maxey and Puckett pulled Holloway out of his cell, gave him Miranda warnings, which Holloway waived, and obtained a confession. At no time did Holloway affirmatively invoke his right to counsel. Rather, counsel was immediately appointed because his was a capital offense.

The Court of Criminal Appeals held that Holloway's Fifth, Sixth and Fourteenth Amendment rights to counsel had not been violated. Holloway v. State, 691 S.W. 2d 608, 614-615 (Tex. Crim. App. 1984). Holloway challenged this holding in the Supreme Court. Holloway v. Texas, 475 U.S. 1105 (1986). The Supreme Court vacated the judgment and remanded the case to be considered in light of Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404 (1989) and Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986).

On remand the Court began by finding Jackson inapplicable because Holloway had never invoked his right to counsel. Holloway v. State, 780 S.W. 2d 787 (Tex. Crim. App. 1989). The Court proceeded to evaluate the case in light of Burbine. The majority in Burbine determined that:

> [W]e readily agree that once the [right to counsel] has attached

> it follows that the police may not interfere with the efforts of a defendant's attorney to act as a medium between the [accused] and the state during interrogation.

Burbine, 475 U.S. at 428 [106 S. Ct. at 1144], quoting Maine v. Moulton, 474 U.S. 159, 176 (1985); Holloway, at 791.

The Court then cited Patterson v. Illinois, 487 U.S. 285 (1988) where the Supreme Court said: "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." From this the Court of Criminal Appeals stated the issue as follows:

> [W]e are here to decide what is meant by "a distinct set of constitutional safeguards" that should be employed in this case where [Holloway] has been formally charged and has a lawyer to represent him.

Holloway, at 791.

The Court pointed out that Fifth Amendment counsel acts only to protect the right to be free from compulsory incrimination. It provides "a means and opportunity to prevent undue pressure to confess guilt; that is, the promise of legal assistance intended to counter compulsion, thus assuring that information surrendered is the product of an unfettered choice to confess guilt." Id., at 792; citing Miranda v. Arizona, 384 U.S. 436, 470 (1966) and Berkemer v. McCarty, 486 U.S. 420 (1984). However, the Fifth Amendment "bars only compulsory self-

incrimination, it does not bar unwise confessions." Id., at 792 citing Connecticut v. Barrett, 479 U.S. 523 (1987). The promise of counsel is personally waivable because "in the Fifth Amendment context counsel's role is nothing more than an assurance that if the suspect wants counsel, counsel will be made available." Id., at 792. "The privilege against self-incrimination is personal…[and] can only be invoked by the individual whose testimony is being compelled." Moran v. Burbine, 475 U.S. at 433 n. 4; Michigan v. Mosely, 423 U.S. 96, 104 n. 10 (1975).

By contrast, the Sixth Amendment right to counsel is in the text of the Amendment itself and protects all critical stages of criminal proceedings. As such, the Sixth Amendment right to counsel serves the broader purpose of providing counsel as an intermediary between the defendant and the State and strives for the goal of a fair adversarial process. See, Holloway v. State, 780 S.W. 2d 787, 793 (Tex. Crim. App. 1989).

In the context of police interrogation the Sixth Amendment right to counsel applies to law enforcement questioning that takes place after the initiation of criminal proceedings. Post arraignment interrogation is a critical stage in which the Sixth Amendment guarantees the assistance of counsel. Maine v. Moulton, 474 U.S. 159, 176 (1985). Its design is to even the competition between the defendant and the myriad prosecutorial forces arrayed against him. The Sixth Amendment

explicitly recognizes that a lawyer is needed in this setting to achieve the only objective of this entire process; that it is fair. See, McNeil v. Wisconsin, 501 U.S. 171, 177-178 (1991) quoting United States v. Gouveia, 467 U.S. 180, 189 (1984). In the present case Appellee was arrested, questioned, arraigned, and questioned again. There is no Sixth Amendment counsel question as to the first interrogation. However, when Appellee was arraigned he went from suspect to defendant which invoked the text of the Sixth Amendment. Appellee exercised his constitutional right and asked for a lawyer.

A lawyer has three roles under the Sixth Amendment. They are: (1) preparatory assistance, (2) preventive assistance, and (3) adversarial assistance. H. Richard Uviller, Evidence from the Mind of the Criminal Suspect, 87 Colum. L. Rev. 1137 (1987). Preparatory assistance is that which employs the mechanisms of adjudication to achieve a just outcome; the effective assistance of counsel. See, Strickland v. Washington, 466 U.S. 668 (1984). Preventive assistance is that which assures that prosecutors will not secure any trial advantages from the defendant by going outside established, and judicially regulated channels. "[Z]ealous counsel is the best instrument to ameliorate the inherent disadvantage of the defendant's position and give him a fair, fighting chance… ." Id., at 1173. "The Sixth Amendment's sole original objective…is…to equalize an accused and protect

against the increased risks of conviction that result when a defendant must deal with the legal system or an expert adversary without a lawyer's guidance." James J. Tomkovicz, The Admissibility of Successive Confessions Following a Deprivation of Counsel, 15 Wm. & Mary Bill Rts 711, 754-755 (2007). Adversarial assistance is that which protects a violation of the adversary system, because "ex parte access is anathma." Uviller, at 1176. "In the pretrial setting, legal assistance helps prevent an accused from providing the adversary with ammunition that can seal his fate." Tomkovicz, at 754.

"Our adversary system is central to the administration of criminal justice. Parity between participants is critical to prevent unfair and unjust outcomes that would be tainted by one side's superiority." Holloway v. State, 780 S.W. 2d at 793; citing Gideon v. Wainwright, 372 U.S. 335 (1963). The Sixth Amendment's guarantee of counsel has been recognized as "indispensable to the fair administration of our adversarial system of criminal justice." Id., citing Maine v. Moulton, 474 U.S. at 168-169. "In short, in our adversarial system of criminal justice, counsel is essential to fairness." Id., at 793. In Gideon Justice Black explained:

> Reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court…cannot be assured a fair trial unless counsel is provided for him. This seems to us an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to

> establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to protect and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but not in ours.

In our adversarial system of criminal justice, counsel is essential to fairness. Holloway v. State, 780 S.W. 2d 787, 793 (Tex. Crim. App. 1989). The Court of Criminal Appeals held that at the time Holloway was interrogated the right to counsel had attached and as such his unilateral waiver of his Sixth Amendment right was invalid despite the receipt of Miranda warnings. This holding was arrived at by analyzing the Sixth Amendment question in light of Burbine as directed by the Supreme Court. The Court placed no reliance on Michigan v. Jackson, finding it inapplicable. Holloway is the law in Texas. It has never been overruled by this Court. The plain wording of article 15.17 also supports this holding.

The record demonstrates that Appellee expressly asked for a lawyer immediately after the magistrate informed him of his right to a lawyer for police interrogation and all other proceedings. "[T]he whole point of the warning… is the right to have

an attorney present during any interview with peace officers." See, Pecina v. State, 361 S.W. 3rd 68, 82 (Tex. Crim. App. 2012) (Alcala J. concurring). Therefore, under Holloway's interpretation of the purpose and scope of the Sixth Amendment right to counsel which comports with the holding and rationale of Burbine, Appellee's Sixth Amendment right to counsel was violated when the police initiated contact for a second post arraignment interrogation in the absence of his lawyer.

PRAYER

Appellee prays this Court reverse the Court of Appeals and render the judgment that should have been rendered on the issues that were argued in the Trial Court.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify the foregoing document contains 7,199 words.

/s/ Allan Fishburn
Allan Fishburn

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was e-served to the Attorney for the Appellant at dcdaappeals@dallascounty.org and the State Prosecuting Attorney at information@spa.texas.gov on this the 9th day of August, 2021.

/s/ Allan Fishburn
Allan Fishburn

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